Union Calendar No. 586

106th Congress, 2d Session – – – – – – – – – – House Report 106–1009

NON-BINDING LEGAL EFFECT OF AGENCY GUIDANCE DOCUMENTS

SEVENTH REPORT

BY THE

COMMITTEE ON GOVERNMENT REFORM

together with

MINORITY AND ADDITIONAL VIEWS

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, DC, October 26, 2000.

Hon. J. DENNIS HASTERT,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: By direction of the Committee on Government Reform, I submit herewith the committee's seventh report to the 106th Congress. The committee's report is based on a study conducted by its Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs.

DAN BURTON,
Chairman.

CONTENTS

ABBREVIATIONS

CRA	Congressional Review Act
OMB	Office of Management and Budget
APA	Administrative Procedure Act
EPA	Environmental Protection Agency
GAO	General Accounting Office
0PM	Particulate Matter
NAAQS	National Ambient Air Quality Standards
DOL	Department of Labor
DOT	Department of Transportation
OSHA	Occupational Safety and Heath Administration
NHTSA	National Highway Traffic Safety Administration
NAM	National Association of Manufacturers

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106TH CONGRESS, *2d Session* } HOUSE OF REPRESENTATIVES { REPORT 106–1009

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Mr. BURTON, from the Committee on Government Reform submitted the following

SEVENTH REPORT

On October 5, 2000, the Committee on Government Reform approved and adopted a report entitled, "Non-Binding Legal Effect of Agency Guidance Documents." The chairman was directed to transmit a copy to the Speaker of the House.

I. SUMMARY OF OVERSIGHT FINDINGS

Various laws enacted by Congress ensure legal protections for the public so that agencies may not issue documents that bind the public without the public's opportunity to participate in the policy-making process. These good government provisions are a key to our democratic process. They protect citizens from arbitrary decisions and enable citizens to effectively participate in the process. If agencies avoid these legal protections or issue documents that do not clearly state if they have binding legal effect or not, the public may be confused or unfairly burdened—sometimes at great cost.

Agencies sometimes claim they are just trying to be "customer friendly" and serve the regulated public when they issue advisory opinions and guidance documents. This may, in fact, be true in many cases. However, when the legal effect of such documents is unclear, regulated parties may well perceive this "help" as coercive—an offer they dare not refuse. Regrettably, the committee's investigation found that some guidance documents were intended to bypass the rulemaking process and expanded an agency's power beyond the point at which Congress said it should stop. Such "back-door" regulation is an abuse of power and a corruption of our Constitutional system.

In 1996, Congress enacted the Congressional Review Act [CRA] to oversee agency legislative rules and agency guidance documents with any general applicability and future effect. Despite repeated requests by the committee and specific direction by Congress in two appropriation cycles, the Office of Management and Budget [OMB] failed to provide sufficient guidance to Federal agencies for implementation of the CRA. The result has been some agency confusion over the legal effect of agency guidance documents and incomplete agency compliance with the CRA.

As a result of the committee's 1999–2000 investigation, the major regulatory agencies have each submitted, between July and September 2000, letters from their chief legal officials to the committee stating that their agency guidance documents have no binding legal effect on the public and that they are taking steps to clearly communicate this fact to the public. These officials state that these guidance documents are "not legally binding" on the public and conclude by saying, "We recognize the importance of using guidance properly, and we have taken—and will continue to take—appropriate steps to address the concerns that guidance not be used as a substitute for rulemaking and to make the legal effect of our documents clear to the public."

Nonetheless, as Law Professor Robert Anthony stated in a 1998 article entitled, "Unlegislated Compulsion: How Federal Agency Guidelines Threaten your Liberty," "Even though those documents do not have legally binding effect, they have practical binding effect whenever the agencies use them to establish criteria that affect the rights and obligations of private persons" (Cato Policy Analysis No. 312, August 11, 1998, p. 1).

II. Report on the Committee's Oversight

On March 29, 1996, Congress enacted the CRA (Title II, Sec. 251 of Public Law 104–121, codified at 5 U.S.C. ch. 8). This law requires that, before a Federal agency "rule" can take effect, the agency shall submit the rule to Congress for congressional review. The CRA defined "rule" broadly, as the term is defined under the Administrative Procedure Act [APA], to include not only regulatory actions subject to statutory notice-and-comment procedures but also other agency actions that contain statements of "general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency" (5 U.S.C. §§ 804(3) and 551(4)).

Thus, the CRA definition is not limited to "legislative" rules subject to notice-and-comment provisions of the APA's section 553. On the contrary, the CRA definition includes any interpretative rule or other agency statement used to apply existing law or implement policy. The legislative history confirms the plain text of the definition: "Interpretive rules, general statements of policy, and analogous agency policy guidelines are covered without qualification because they meet the definition of a 'rule' borrowed from section 551 of title 5, and are not excluded from the definition of a rule."[1] Therefore, under the CRA's definition of a "rule," agency guidance

[1] Statement of Representative McIntosh, Mar. 28, 1996, *Congressional Record* at H3005.

with any general applicability and future effect is subject to congressional review under the CRA.

Since March 1996, the Government Reform Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs continually reviewed agency compliance with the CRA and found that agencies failed to report many guidance documents that fall within the CRA's definition of a "rule." Under the CRA, the Federal agency issuing a rule must file a report to Congress "[b]efore a rule can take effect" (5 U.S.C. § 801(a)(1)(A)). In other words, unless and until an agency properly reports a rule, the rule has no legal force or effect. Any action the agency takes to promulgate, implement, or enforce an unreported rule is an *ultra vires* act and, therefore, legally null and void.

The subcommittee continues to believe that agency noncompliance is largely due to insufficient implementation guidance from OMB. Despite OMB's obligation under President Clinton's Executive Order No. 12866 to provide the agencies with guidance on compliance with regulatory laws, OMB has done very little to ensure that the agencies are complying with the CRA. The result has been some agency confusion about the CRA and incomplete agency compliance with the CRA.

For example, the subcommittee's review of the Environmental Protection Agency's [EPA's] compliance with the CRA revealed that, in February 1998, EPA issued "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits" (its "Environmental Justice" guidance). This guidance established a framework for handling complaints that are filed with EPA's Office of Civil Rights under Title VI of the Civil Rights Act of 1964, as amended. Such complaints allege disparate environmental impacts on minority populations resulting from the issuance of industrial site permits by State and local governments that receive EPA funding. In light of the legal and policy effects of this guidance, the subcommittee asked the General Accounting Office [GAO] to determine if this guidance was a rule within the meaning of the CRA. On September 1, 1998, GAO determined that this guidance was a rule under the CRA and indicated that EPA had not yet submitted this guidance for congressional review under the CRA.

On December 8, 1998, the subcommittee asked EPA whether it intended to submit its "Proposed Implementation Guidance for the Revised Ozone and Particulate Matter [PM] National Ambient Air Quality Standards [NAAQS] and Regional Haze Program," and many other related guidance documents, to Congress under the CRA. In a letter dated March 2, 1999, EPA replied that "EPA does not intend its policy statements and guidance documents to be binding and they have no binding legal effect on the public." EPA further stated that "if such documents do contain binding legal requirements, EPA considers them within the scope of the CRA and submits them to Congress."

On September 20, 1999, the subcommittee asked EPA why it had not submitted its "Final Guidance on Environmentally Preferable Purchasing for Federal Agencies" for congressional review under the CRA. On October 6th, EPA replied that its guidance has no legal effect and is not binding; instead, it "merely suggests" and "encourages agencies" to follow EPA's guidance. EPA's March 1999

and October 1999 letters to Subcommittee Chairman David McIntosh are included in appendix A.

To encourage OMB to carry out its responsibilities under the CRA, the subcommittee proposed to increase the 1998 Treasury and General Government Appropriations Act budget for OMB's Office of Information and Regulatory Affairs by $200,000—specifically to help with CRA implementation. Congress accepted this proposal. Nonetheless, $200,000 and 12 months later, OMB showed no signs of improvement. Despite continued requests from the subcommittee, OMB failed to issue complete, government-wide CRA implementation guidance to the agencies. For example, OMB failed to inform the agencies that agency guidance documents with general applicability and future effect are "rules" under the CRA and must be submitted for congressional review. Without full compliance, the public is robbed of the opportunity to have Congress review costly and burdensome requirements, some of which may exceed congressional authorization or intent.

As a result of the subcommittee's oversight and analysis, on October 21, 1998, as part of the 1999 Treasury and General Government Appropriations Act, Congress enacted a requirement for OMB to provide additional guidance to the agencies on specific provisions of the CRA by March 31, 1999, to ensure full implementation of the CRA (under OMB Salaries and Expenses in Public Law 105–277). The accompanying Conference Report stated, "The conferees have been assured that OMB will strictly adhere to the statutory requirements included in the bill on Paperwork Reduction and the Congressional Review Act. The conferees will monitor OMB's compliance with these requirements carefully" (House Report 105–825).

The subcommittee reached an understanding with OMB, which was memorialized in a September 23, 1998 letter from the subcommittee to OMB and a September 24th return letter from OMB to the subcommittee. Unfortunately, OMB did not share its draft guidance with the subcommittee until Friday, March 25, 1999. On Monday, March 29th, the subcommittee met with OMB and expressed its view that the draft was not responsive to the subcommittee's expectations, the previous agreements between the subcommittee and OMB, or congressional intent. In a nutshell, OMB was required to provide expanded and complete guidance; instead, OMB's draft barely expanded on its previous guidance and did not address the key issues which needed clarification and expansion.

Nonetheless, OMB issued its revised guidance the next day (March 30th), making only four minor changes in the draft based on the subcommittee's comments. On April 1st, the subcommittee directed OMB to issue the previously agreed-upon expanded and complete guidance by April 30th, including an elaboration of the definition of "rule," a discussion of the "good cause" exemption for a change in the effective date of a rule, and a discussion of the legal standing, effectiveness, and potential for judicial review of rules not submitted for congressional review under the CRA.

Throughout 1999, OMB continued to resist issuing full CRA guidance to the agencies, necessitating the subcommittee's additional letters to OMB, dated June 2nd, August 2nd, and October 12th. Subcommittee Chairman McIntosh's four 1999 letters to

OMB about its CRA guidance to the agencies are included in appendix B.

After these repeated and unsuccessful requests that OMB provide additional CRA guidance to the agencies, on October 8, 1999, the subcommittee began an investigation of the agencies' use of non-codified guidance documents. The subcommittee sought to verify that each document with any general applicability and future effect was submitted to Congress under the CRA and that each document included an explanation to ensure the public's understanding of the document's legal effect.

The subcommittee requested that the Department of Labor [DOL], the Department of Transportation [DOT] and EPA—three of the agencies imposing the most regulatory requirements on the public—complete a compendium of all their non-codified documents in tabular format and to provide a copy of each non-codified document, including a highlighted and tabbed reference to the specific explanation in the document itself regarding its legal effect. These letters began by saying, "This letter begins our investigation of your agency's use of non-codified documents (such as guidance, guidelines, manuals, and handbooks) and your agency's explanation within each of them to ensure the public's understanding of their legal effect." The compendium required the agencies to reveal which documents had been submitted for congressional review under the CRA and which documents were legally binding. Chairman McIntosh's October 1999 letters to DOL, DOT and EPA are included in appendix C.

In a November 12th meeting, DOL and DOT asked the subcommittee to narrow the request. In response, the subcommittee narrowed the initial request to only those documents issued since the March 1996 enactment of CRA by DOL's Occupational Health and Safety Administration [OSHA] and DOT's National Highway Traffic Safety Administration [NHTSA], respectively. On December 31, 1999, DOT submitted its NHTSA compendium and 1,225 guidance documents. On January 3, 2000, DOL submitted its OSHA compendium and guidance documents. On February 7, 2000, EPA submitted its compendium and 2,653 guidance documents.

However, after OSHA Assistant Secretary Charles Jeffress, in testimony before the House Education and the Workforce Committee's Subcommittee on Oversight and Investigations on January 28, 2000, cited an even higher number of guidance documents than DOL claimed in its earlier response to the Government Reform subcommittee's request, the subcommittee determined that the number of OSHA documents was not 1,641, as DOL had claimed, but actually 3,374. On August 23rd, DOL submitted its revised compendium. DOL's OSHA and EPA's compendiums are included in appendix D.

On January 24, 2000, Subcommittee Chairman McIntosh introduced H.R. 3521. Section 4 of this bill was intended to ensure the public's understanding of the effect of agency guidance documents. It required agencies to include a notice on the first page of each agency guidance document to make clear that, if the document has no general applicability or future effect, it is not legally binding on the public. On January 31st, Chairman McIntosh asked for the views of DOL, DOT and EPA on Section 4 of this bill and asked for them to be submitted before the subcommittee's upcoming Feb-

ruary 15th hearing. Unfortunately, none of the three agencies replied before the hearing.

On February 15, 2000, the subcommittee held a hearing entitled, "Is The Department of Labor Regulating the Public Through the Backdoor?" The purpose of the hearing was to examine DOL's use of nonregulatory guidance documents and to determine whether DOL was regulating the public through the backdoor—by imposing binding legal requirements in nonregulatory guidance documents. The hearing allowed the Department's chief legal officer, Solicitor Henry Solano, to discuss DOL's use of nonregulatory guidance documents instead of public rulemaking and the ways in which DOL disclosed or failed to disclose whether or not each such guidance document is legally binding on the public.

Besides Mr. Solano, witnesses included: Michael E. Baroody, senior vice president, Policy, Communications and Public Affairs, National Association of Manufacturers [NAM] and former Assistant Secretary of Policy, DOL; Robert A. Anthony, George Mason University Foundation professor of law and former chairman, Administrative Conference of the United States; Jud Motsenbocker, owner, Jud Construction Co., Muncie, IN; Dixie Dugan, human resource coordinator, Cardinal Service Management, Inc., New Castle, IN; Dave Marren, vice president and division manager, the F.A. Barlett Tree Expert Co., Roanoke, VA; and Adele Abrams, attorney with Patton, Boggs in Washington, DC.

The hearing revealed that: (a) DOL and DOT had admitted that *none* of their listed guidance documents were legally binding on the public; (b) DOL and DOT had admitted that *none* of their listed guidance documents were submitted to Congress for review under the CRA; (c) the vast majority of DOL's and DOT's submitted guidance documents did not make it clear to the public that the documents are not legally binding on the public; and (d) only 8 percent of DOL's 1999 OSHA guidance documents included any explanation of legal effect and only 5 percent put this explanation at the beginning of the document. In contrast, DOT included an explanation of legal effect in about 40 percent of its NHTSA guidance documents.

The hearing also examined several areas of DOL guidance. Mr. Baroody opened his testimony by saying, "To put the matter simply, your subject is important. It is important economically and commercially, socially and politically, legally and constitutionally." He provided many examples of agency guidance documents which make "the point that the problem of non-regulatory guidance, 'non-rule rules,' back-door rulemaking as it is variously described, is not just a problem at the Occupational Safety and Health Administration, nor is it just a problem at the Department of Labor. It is a problem widespread in this Administration."

He continued, "This subcommittee is properly focused on agency avoidance of the scrutiny and oversight provided for by the Administrative Procedure Act, the Congressional Review Act and similar enactments. In fact such avoidance through 'guidance,' through interpretive and opinion letters, through compliance documents and the like is always inappropriate and at least occasionally illegal. Equally troubling are the occasions when an agency might technically comply with such legal requirements but does so in a way that may be best described as pretextual—in other words, when compliance with what I have called the accountability statutes is

a ruse." Mr. Baroody's testimony on behalf of NAM is included in appendix E.

The hearing, including testimony by Ms. Dugan, examined one aspect of DOL's Family and Medical Leave Act [FMLA] guidance. The hearing revealed that DOL issued a nonregulatory but policysetting guidance opinion letter which redefined a "serious health condition" under the 1993 FMLA. DOL's 1995 opinion letter said that minor illnesses, such as the common cold, were not a serious health condition. However, in December 1996, DOL retracted its previous definition and stated that the common cold, the flu, ear-aches, upset stomachs, et cetera, all are covered by the FMLA if an employee is incapacitated more than 3 consecutive days and receives continuing treatment from a health care provider. Ms. Dugan's testimony explained that the consequences of this nonregulatory and costly redefinition reverberated throughout the employer world and actually created a problem for needy people. Ms. Dugan, a human resource coordinator for a private, for-profit corporation whose services include group homes and supported living apartments, explained, "When employees are legitimately on leave we find a way to cover for them; however, under DOL opinion letters unscheduled and unplanned absences and illegitimate leave hurts us. They threaten our ability to serve our clients who are counting on us to be there 24 hours a day. We share this dilemma with many industries where unscheduled and unplanned absences can affect customers and coworkers."

The hearing noted DOL's backdoor work-at-home guidance. On January 5, 2000, the subcommittee wrote to DOL about its November 15, 1999, work-at-home policysetting guidance letter, which was not included in DOL's 3,374 OSHA documents submitted to the subcommittee, since it was issued after the subcommittee's October 8th request letter. The subcommittee sought to determine if DOL's 1999 guidance had been submitted to Congress for review under the CRA and if it was legally binding on the public. Of especial concern was DOL's expansion, without any express statutory delegation from Congress, of its jurisdiction into private homes. Subsequently, DOL withdrew this guidance document; however, DOL's 1993, 1995, and 1997 work-at-home guidance documents had not been withdrawn as of the hearing. However, the 1993 and 1995 documents had an advisory on OSHA's website that they were "under review."

The hearing, including testimony by Mr. Marren, explored DOL's 1998 and 1999 guidance documents for arborists. DOL withdrew both of these guidance documents after threats of lawsuits against DOL for not following the APA's statutory procedures for new rulemaking.

One of these guidance documents was removed from OSHA's website right before the subcommittee's hearing.

During the hearing, Subcommittee Ranking Member Dennis Kucinich stated his desire "that we move forward in a bi-partisan way to try to craft some language which may be of assistance to our friends in the private sector, but not in any way serve to undermine the spirit of the laws which we have taken part in passing."

As a consequence, after late replies from DOL, DOT and EPA about Section 4 of H.R. 3521, on May 3rd and May 19th, sub-

committee majority and minority staff met with officials of these agencies and OMB. After being unable to reach agreement on revised legislative language, on May 19th, Subcommittee Chairman McIntosh wrote eight additional regulatory agencies for a compendium of their non-codified documents issued since March 1996 and a copy of the first page of each such document and all other pages with any specific explanation in the document itself regarding its legal effect. These agencies included: the Department of Agriculture, the Department of Energy, the Food and Drug Administration in the Department of Health and Human Services, the Fish and Wildlife Service in the Department of the Interior, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Trade Commission, and the Securities and Exchange Commission.

In addition, DOL and DOT were asked to provide compendiums and the other information for the rest of their bureaus since they had previously only provided such information for OSHA and NHTSA, respectively. Since EPA had provided information on all of its guidance documents issued since March 1996 and since EPA had submitted March 1999 and October 1999 letters confirming that its guidance documents have no binding legal effect on the public (see appendix A), it was not additionally tasked.

Instead of producing the requested compendiums and other information, DOT proposed and then orchestrated a model letter for each of the agencies to send the subcommittee to clarify the non-binding legal effect of their agency guidance documents. The subcommittee agreed and then worked with DOT staff to develop a mutually acceptable model letter. From July to September 2000, these eight agencies, along with DOL and DOT, each submitted their individual clarification letters from their chief legal officials stating that their agency guidance documents are not legally binding on the public.

The letters state that their guidance documents are "not legally binding" and conclude by saying, "We recognize the importance of using guidance properly, and we have taken—and will continue to take—appropriate steps to address the concerns that guidance not be used as a substitute for rulemaking and to make the legal effect of our documents clear to the public." Additionally, the letters explain that the public can "rely" on agency guidance, especially in an enforcement action, i.e., the guidance provides a "safe harbor." In fact, agency guidance is often legally binding on the agency itself. Chairman McIntosh's May 2000 letters to the eight agencies are included in appendix F. The 10 agencies' July to September 2000 clarification letters about the non-binding legal effect of their guidance documents are included in appendix G.

III. CONCLUSIONS

The committee finds that, since the March 1996 enactment of the CRA, OMB failed to provide sufficient guidance to the agencies on implementation of the CRA. The result has been some agency confusion about the CRA, especially about agency guidance documents subject to congressional review under the CRA, and incomplete agency compliance with the CRA. Under the CRA, agency guidance with any general applicability and future effect is subject to con-

gressional review. Without the required congressional review, covered agency guidance has no legal force or effect.

The committee also finds that agencies have sometimes improperly used guidance documents as a backdoor way to bypass the statutory notice-and-comment requirements for agency rulemaking and establish new policy requirements.

The committee further finds that agencies often do not clearly state within their guidance documents that they are not legally binding on the public. As a consequence, the public often is confused and unfairly burdened, sometimes at great cost.

As a consequence, the committee requested information from the major regulatory agencies about their use of nonregulatory guidance documents, their submissions for congressional review under the CRA, and their specific explanations within each guidance document regarding its legal effect. The agencies responded by submitting letters to the committee confirming that their guidance documents have no legally binding effect on the public.

The committee is pleased to make these agency letters available to the public but remains concerned about future backdoor rulemaking attempts by the agencies and future agency guidance documents without explanations regarding their non-binding legal effect on the public. As a consequence, the committee intends to continue its oversight in this area and asks the public to inform the committee about any instances of agency guidance which either establishes policy through the backdoor or is unclear about its not-binding legal effect on the public.

[The appendixes referred to follow:]